SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 442.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM GEORGE.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

INDEX.

1 Pleas before the Honorable William H. Munger, judge of the District Court of the United States for the District of Nebraska, sitting in said court, within the eighth judicial circuit, at the April term, 1911, thereof.

Be it remembered, that on the 19th day of October, 1906, the following proceedings were had in the District Court of the United States for the District of Nebraska, as appear of record in Journal "V," page 462, of said court, to wit:

UNITED STATES OF AMERICA *vs.* WILLIAM GEORGE. 139–0	Presentment of indictment.

On this day the grand jury came into court, having been, heretofore, to wit: On the 24th day of September, A. D. 1906, duly drawn according to law and duly empaneled and sworn on the 9th day of October, A. D. 1906, to well and truly try and true presentment make of all matters coming under their notice and by their foreman, F. D. Wead, presented to the court a true bill of indictment against said defendant, William George, charging him, said defendant, with perjury, as specifically set forth in said indictment, contrary to the laws of the United States.

Whereupon, on motion of Hon. Charles A. Goss, attorney of the United States for the District of Nebraska, it is ordered, by the court, that said bill of indictment be received and that the clerk endorse thereon, "Presented in open court by the grand jury and filed October 19, 1906."

2 Thereupon, afterwards, to wit, on the said 19th day of October, 1906, indictment was duly filed in said case, which said indictment is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Nebraska, ss:

In the District Court of the United States within and for the District of Nebraska, in the eighth judicial circuit, in the term beginning the eighth day of October, in the year of our Lord one thousand nine hundred and six.

The grand jurors of the United States of America duly impanelled, sworn, and charged by said court to inquire within and for the said district of Nebraska, upon their oaths do present that William George, on, to wit, the seventeenth day of February, in the year of our Lord one thousand nine hundred and six, at North Platte, in the county of Lincoln, in the State of Nebraska, district aforesaid, and within the jurisdiction of this court then and there being, did then and there in said county and State, willfully, knowingly, and corruptly make and subscribe a certain false and fraudu-

lent homestead proof—testimony of claimant—and did then and there unlawfully, willfully, knowingly, and corruptly depose, subscribe, state, and swear and take his solemn oath in the matter and proceedings wherein a law of the United States authorizes an oath to be administered, before one George E. French, who was then and there the duly appointed, qualified, and acting register of the United States land office at said town of North Platte, aforesaid, an officer then and there duly authorized to administer said oath, that said homestead proof—testimony of claimant—sworn to and subscribed as aforesaid by the said William George, was then and there true, which said homestead proof—testimony of claimant—was
3 then and there made and subscribed as aforesaid in a matter and proceeding then and there pending before the land office at North Platte, district of Nebraska, wherein the said William George was making proof and final entry, for the lands known and described as follows: The southeast quarter of section twelve, township twelve north, range twenty-seven west, sixth principal meridian, and having knowingly and willfully taken his solemn oath as aforesaid, then and there deposed, stated, and testified in substance and effect as follows, to wit: I (the said William George meaning) am the identical person who made homestead entry number 18816. The description of my (the said William George meaning) said land (the land heretofore described meaning) is the southeast quarter section twelve, township twelve north, range twenty-seven west. My (the said William George meaning) house was built on this land (the land heretofore described meaning) and I (the said William George meaning) established residence thereon in April, 1901. Description of my (the said William George meaning) improvements on this land (the land heretofore described meaning) are frame house, 12 by 14 feet, frame barn, well and windmill, tanks, chicken house, hogpens, one-half mile two-wire fence, value of the same, $300.00. My (the said William George meaning) family consists of wife and one child. I (the said William George meaning) was married in June, 1902. I (the said William George meaning) have resided continuously on this land (the land heretofore described meaning) since first establishing residence thereon and my (the said William George meaning) family have since I have been maried. I (the said William George meaning) have been absent from this land (the land heretofore described meaning) about one month in August each year when putting up hay on a claim about four miles from my (the said William George meaning) homestead (the land heretofore described meaning). I (the
4 said William George meaning) have also been absent at different times each winter since filing on this land (the land heretofore described meaning) (but not to exceed one week at any one time) when bailing hay. These absences would usually extend over a period of about two months each winter. I (the said William George meaning) have not sold, conveyed, or mortgaged any portion of this land (the land heretofore described meaning). At

present I (the said William George meaning) have about 100 head of horses and cattle on my (the said William George meaning) wife's claim where I (the said William George meaning) am feeding them, about four miles from my (the said William George meaning) homestead. I (the said William George meaning) keep this stock on my homestead (the land heretofore described meaning) at all times except during the winter. My (the said William George meaning) household goods and farming implements are kept on the homestead (the land heretofore described meaning) at all times.

That at and upon the final proof in the matter of the homestead entry theretofore made by the said William George it became and was a material enquiry whether the said William George had resided continuously on said land and homestead entry since filing and entering the same, and whether or not the said William George had cultivated the same, and further what improvements, if any, the said William George had made on said homestead, together with the value thereof, and for what period of time the said William George had been absent from said homestead since filing and entry thereon, and whether the said William George was acting in entire good faith in perfecting his said entry.

Whereas in truth and in fact said homestead proof-testimony of claimant, so sworn to and subscribed as aforesaid by the said William George, was false and untrue in this, that the said William George had not established a residence on said homestead in April, 1901, or at any other date, and did not build a house on said homestead and establish a residence therein in April, 1901, or at any other date; that it is not true that the said William George had improvements consisting of a frame house 12 by 14 feet, frame barn, well, and windmill, tanks, chicken house, hogpens, one half mile two-wire fence, of the value of $300.00, upon said homestead, or any improvements whatever thereon; that it is not true, as stated in said homestead proof-testimony of claimant, that said William George had continuously resided on said land since first establishing residence thereon and his family have resided there since his marriage; that it is not true that the said William George had been absent from this land only about one month, in August each year, and at different times each winter when baling hay, said absences extending over a period of about two months, but in truth and in fact the said William George never established any residence or settlement at any time on said homestead, but lived and resided elsewhere continuously from the time of entering said homestead until the date of final proof; that the improvements on said homestead were not worth the sum of $300.00, or any other sum of money whatever, and there was no house, barn, well, windmill, tanks, chicken house, hogpens, one-half mile of wire fence whatever upon said homestead; and that said entryman was not acting in good faith in making said entry and final proof as a home for himself, but in fact to defraud the United States out of the use, title, and possession of said land.

And so the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that William George then and there well knew that said homestead proof-testimony of claimant and oath thereto, so subscribed and taken as aforesaid by the said William George, was then and there false and untrue as aforesaid, and that said William George then and there well knew that said
6 homestead proof-testimony of claimant, and the matters and things stated therein, were false and untrue, and knowing the same did then and there unlawfully, willfully, knowingly, and corruptly, and contrary to his said oath, depose, swear, and state, and take his solemn oath and sign and subscribe said false and fraudulent homestead proof-testimony of claimant as true as to the matters and things hereinbefore set forth, which were material, and which the said William George knew were material, and knowing them material did not believe them to be true at the time of the making and subscribing of said homestead proof-testimony of claimant, contrary to the form, force, and effect of the statute of the United States of America in such case made and provided and against the peace and dignity of the said United States.

CHARLES A. GOSS,
United States Attorney.

Endorsements appear on said indictment in words and figures following, to wit:

Presented in open court by the grand jury and filed Oct. 19, 06.
R. C. HOYT, *Clerk.*

No. 139, Doc. O. United States district court.
United States v. William George. Indict: Perjury. Sec. 5392, R. S. A true bill: F. D. Wead, foreman. Charles A. Goss, U. S. attorney. S. R. Rush, spec. asst. U. S. attorney. Filed Oct. 19, 1906, R. C. Hoyt, clerk.

7 Thereupon, afterwards, to wit: At the September term, 1906, on the 29th day of October, 1906, the following proceedings were had in said case, as appear of record in Journal "V," page 477, of said court, to wit:

UNITED STATES OF AMERICA
vs.
WILLIAM GEORGE. } Capias ordered, bond fixed. 139–O.

Capias ordered, bond fixed. 139–O.

On motion of Hon. Charles A. Goss, attorney of the United States for the district of Nebraska, it is ordered by the court that a writ of capias issue out of this court for the arrest of said defendant, William George, returnable forthwith.

And further ordered by the court that the bond of said defendant be, and the same is hereby, fixed in the sum of five hundred dollars ($500.00).

8 Thereupon, afterwards, to wit: On the 9th day of November, 1906, bond was duly filed in said case, which said bond is in words and figures following, to wit:

UNITED STATES OF AMERICA, *District of Nebraska, ss:*

Be it remembered, that on this 7" day of November, A. D. 1906, before me, a United States commissioner for the said district of Nebraska, personally came William George, as principal, and Frederick George, as surety, and jointly and severally acknowledged themselves to owe the United States of America the sum of five hundred dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the said William George shall personally appear before the district court of the United States in and for the district aforesaid, at first day of the November term thereof, and then and there to answer the charge of having, on or about the ____ day of _____, A. D. 19__, within said district, in violation of section ____ of the Revised Statutes of the United States, unlawfully ____ indictment for perjury, contrary to the laws of the United States, and then and there abide the judgment of the said court, and not depart without leave thereof, then this recognizance to be void, otherwise to remain in full force and virtue.

WILLIAM GEORGE. [SEAL.]
FREDERICK GEORGE. [SEAL.]

Taken and acknowledged before me on the day and year first above written.

J. L. CLEARY,
United States Commissioner, as aforesaid.

9 UNITED STATES OF AMERICA,
District of Nebraska, ss:

Frederick George, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at Brady Island, in the county of Lincoln, in said district, that he is a freeholder in the county of Lincoln, that he is worth the sum of two thousand dollars, over and above all his debts and liabilities, in property subject to execution and sale, and that his property consists of

(Affiant's signature) FREDERICK GEORGE.

Sworn to and subscribed before me this 7" day of November, A. D. 1906.

J. LEO CLEARY,
United States Commissioner as aforesaid.

Endorsed: Filed Nov. 9, 1906, R. C. Hoyt, clerk.

10 Thereupon, afterwards, to wit: On the 14th day of November, 1907, demurrer to the indictment was duly filed in said case, which said demurrer is in words and figures following, to wit:

United States District Court, District of Nebraska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM GEORGE, DEFENDANT. } Demurrer to the indictment.

1. Comes now the defendant in the above-entitled action, William George, and demurs to the indictment filed against him in this action, for the reason that said indictment fails to state or charge any crime under the laws of the United States.

2. For the reason that there is no law of the United States which required the defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment. The law of the United States requires that said facts be proven by two credible witnesses other than the claimant, and does not authorize the claimant to testify in his own behalf with reference thereto.

WILCOX & HALLIGAN,
Attorneys for the Defendant, William George.

Endorsed: Filed Nov. 14, 1907, R. C. Hoyt, clerk.

11 Thereupon, afterwards, to wit: At the April term, 1911, on the 26th day of July, 1911, the following proceedings were had in said case, as appear of record in Journal "Z," page —, of said court, to wit:

UNITED STATES OF AMERICA,
vs.
WILLIAM GEORGE. } Demurrer sustained. 139–0.

Now on this 26th day of July, 1911, this cause came on to be heard upon the demurrer, filed by the defendant, to the indictment against him, and the court being fully advised in the premises doth sustain said demurrer. To all of which the plaintiff excepts.

It is further ordered, by the court, that the indictment herein be and the same is hereby dismissed. To which order and ruling the United States of America excepts.

12 Thereupon, afterwards, to-wit: On the 24th day of August, 1911, petition for writ of error was filed in said case which said petition is in words and figures following, to wit:

In the District Court of the United States, in and for the District of Nebraska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM GEORGE, DEFENDANT.
} Petition for writ of error.

And comes now the United States, plaintiff herein, and says that on the 26th day of July, 1911, this court made its decision sustaining the demurrer of the defendant herein and setting aside the indictment in this cause, and thereafter, on the said 26th day of July, 1911, this court, pursuant to that decision, entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such a character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error; all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court.

F. S. HOWELL,
United States Attorney for the District of Nebraska.

Endorsed: Filed Aug. 24, 1911, R. C. Hoyt, clerk.

13 Thereupon, afterwards, to wit: On the said 24th day of August, 1911, assignment of errors was duly filed in said case, which said assignment of errors is in words and figures following, to wit:

In the District Court of the United States, in and for the District of Nebraska.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM GEORGE, DEFENDANT.
} Assignment of errors.

Comes now the United States of America, plaintiff in the above entitled cause, and files this assignment of errors to the judgment heretofore entered by the United States District Court for the District of Nebraska in the above entitled cause, to wit:

First. The said United States District Court in and for the District of Nebraska, erred in sustaining the demurrer to the indictment in the above entitled cause.

Second. The said court erred in setting aside said indictment and discharging the defendant, William George.

Third. The court erred in construing section 2291, Revised Statutes of the United States, as amended by the act of March 3, 1877, (19 Statutes at Large, page 403), and erred in holding the said entryman, William George, defendant herein, in the matter and proceeding of his said final homestead proof, to be an incompetent witness as to the material fact of whether or not he had resided upon and cultivated said homestead, as required by law.

Fourth. The court erred in construing said section 2291 of the Revised Statutes of the United States, as amended, and erred in holding the testimony and proof of said defendant, William George, in the matter and proceeding of his said final homestead proof, as to his residence and cultivation, to be incompetent and immaterial testimony.

14 Fifth. The said court erred in construing section 2291 (as amended) and 5392 of the Revised Statutes of the United States, and erred in holding that the oath administered to the defendant, William George, in the matter of his said final homestead proof as to residence and cultivation of his said homestead, was not an oath administered to such claimant in a matter and proceeding authorized by the laws of the United States, and that perjury could not be predicted on the evidence given by the said defendant under said oath, as charged in the indictment herein.

Sixth. The court erred in construing said section 2291 (as amended) and 5392 of the Revised Statutes of the United States, and erred in holding that the defendant could not give testimony in his own behalf in the matter of his final homestead proof as to his residence thereon and cultivation thereof, and should claimand so testify falsely, as charged in the indictment herein, he could not be prosecuted for perjury on his said testimony.

Seventh. The court erred in its construction of the law upon which said indictment is based and founded, to wit, section 2291 (as amended) and 5392 of the Revised Statutes of the United States, and erred in holding that there is no law of the United States which required the defendant as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment; the law of the United States requiring that said facts be proved by two credible witnesses other than the claimant, and not authorizing the claimant to testify in his own behalf with reference thereto.

Wherefore, the United States of America prays that the judgment of the District Court of the United States for the District of Nebraska be reversed, and that the said district court be directed to reinstate the said indictment and proceed with the trial of the cause.

F. S. HOWELL,
United States Attorney for the District of Nebraska.

Endorsed: Filed Aug. 24, 1911. R. C. Hoyt, clerk.

15 Thereupon, afterwards, to wit: At the said April term, 1911, on the 24th day of August, 1911, the following order, allowing

writ of error, was signed and filed in said case, and duly entered of record therein, in Journal "Z," page____, of said court, to wit:

In the District Court of the United States, in and for the District of Nebraska.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* WILLIAM GEORGE, DEFENDANT. | Order allowing writ of error. No. 139. Doc. O.

This 24th day of August, 1911, came the United States of America, plaintiff herein, by its attorney, and filed herein and presented to the court its petition praying for the allowance of a writ of error, and upon reading said petition and the assignment of errors therein referred to, it is ordered, by the court, that the petition be, and the same hereby is, allowed, and that a writ of error as therein prayed be issued by the clerk of the district court for this district, under the seal of such district court, pursuant to section 1004 of the Revised Statutes.

Dated Omaha, Nebraska, August 24th, 1911.

WM. H. MUNGER, *District Judge.*

Endorsed: Filed Aug. 24, 1911. R. C. Hoyt, clerk.

16 Thereupon, afterwards, to-wit: On the said 24th day of August, 1911, Bill of Exceptions was filed in said case, which said Bill of Exceptions is in words and figures following, to-wit:

In the District Court of the United States, in and for the District Nebraska.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* WILLIAM GEORGE, DEFENDANT. | Bill of exceptions.

Be it remembered, that in this cause, on the 14th day of November, 1907, the defendant, William George, filled a demurrer to the indictment herein, which said demurrer is fully set forth in words and figures in the transcript of the record proper of this cause, and is in the words and figures following, to-wit:

"United States District Court, District of Nebraska.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* WILLIAM GEORGE, DEFENDANT. | Demurrer to indictment.

1. Comes now the defendant in the above entitled action, William George, and demurs to the indictment filed against him in this ac-

tion, for the reason that said indictment fails to state or charge any crime, under the laws of the United States.

2. For the reason that there is now law of the United States which requires the defendant, as claimant, to make his homestead proof, to testify with reference to the matters and things set forth in the indictment. The law of the United States requires that said facts be proved by two credible witnesses other than the claimant and does not authorize the claimant to testify in his own behalf with reference thereto.

WILCOX & HALLIGAN,
Attorneys for Defendant, William George."

17 And afterwards and on, to-wit, the 26th day of July, 1911, before the court, the Honorable William H. Munger, district judge, presiding, and W. T. Wilcox, esquire, and J. J. Halligan, esquire, appearing as counsel for the defendant, and F. S. Howell, esquire, United States attorney for the district of Nebraska, appearing as counsel for the United States, this cause came on to be heard upon the indictment herein and the demurrer filed to and against the same, and was argued by counsel.

And afterwards, to-wit, on the said 26th day of July, 1911, of this same term, the court made its decision and order upon the matters so heard and argued, granting the said demurrer, and each ground thereof, to the indictment as a whole, all for the reasons and upon the grounds, and those only, which are set forth in the said demurrer, which said order of the court is in the words and figures following, to-wit:

"In the District Court of the United States, District of Nebraska.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
WILLIAM GEORGE, DEFENDANT.

Now, on this 26th day of July, 1911, this cause came on to be heard upon the demurrer filed by the defendant to the indictment against him, and the court being fully advised in the premises doth sustain said demurrer. To all of which the United States of America, plaintiff herein, excepts. It is further ordered by the court that the indictment herein be, and the same is hereby, dismissed. To which order and ruling the United States of America excepts."

That the court, in sustaining said demurrer and rendering said decision setting aside the indictment in said cause, based its decision, order, and judgment upon a construction of the law upon which said indictment was founded, to-wit, section 5392 of the Revised
18 Statutes, and section 2291 of the Revised Statutes, as amended by the act of March 3, 1877, (19 Stat. Large, 403), and held that there is no law of the United States which required the defend-

ant, as claimant, in making him homestead proof, to testify with reference to the matters and things set forth in the indictment; the law of the United States requiring that said facts be proved by two credible witnesses other than the claimant, and not authorizing the claimant to testify in his own behalf with reference thereto.

To which decision and order of the court, so, for the reasons and upon the grounds aforesaid, granting the said demurrer and sustaining the same as to said indictment, and quashing, vacating, annuling, and setting aside the said indictment, upon each of the grounds stated in said demurrer, the United States, by its counsel, then and there duly excepted, and likewise duly excepted to the decision and order of the court as a whole, sustaining said demurrer.

And thereafter, on the said 26th day of July, 1911, the said court made and entered its final judgment in this cause, pursuant to the said order and decision, and based upon the reasons and grounds set forth in said demurrer, and particularly upon the reasons and grounds stated and set forth in the second cause or ground of said demurrer, and the construction placed upon said section 5392 and 2291 of the Revised Statutes, and, upon said reasons and grounds, and the construction of said sections, adjudging that the defendant, William George, of and from the premises in the indictment specified, be discharged and go hence without day. To which judgment of the court, and to each and every part thereof, for the reasons and upon the grounds aforesaid, in the said demurrer and opinion expressed, and particularly to that part adjudging that, for the reasons and upon the grounds aforesaid, in the said demurrer and opinion expressed, as aforesaid, the defendant, William George, of and from the premises in the indictment specified, be discharged and go hence without day, the United States, by its counsel, then and there duly excepted.

19 And forasmuch as the foregoing matters do not fully appear of record, the plaintiff tenders this its bill of exceptions, and prays that the same may be signed and duly authenticated and made a part of the record herein, which is accordingly done this 24th day of August, 1911.

WM. H. MUNGER, *District Judge.*

Service of the foregoing bill of exceptions was made upon this 22 day of August, 1911.

W. T. WILCOX,
J. J. HALLIGAN,
Attorneys for Defendant, William George.

Endorsed: Filed Aug. 24, 1911. R. C. Hoyt, clerk.

20 Thereupon, afterwards, to wit: On the 24th day of August, 1911, a writ of error was allowed in said case, and a citation duly signed, and returned and filed on August 25th, 1911, with

acceptance of service endorsed thereon, the following of which are the originals:

21 The President of the United States of America.

To the honorable judge of the District Court of the United States for the District of Nebraska.

Because in the decision, record, and proceedings, as also in the rendi*t*ition of the judgment of a plea which is in the said district court before you, between the United States of America, plaintiff, and William George, defendant, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and the customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States Supreme Court, the 24th day of August, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] R. C. HOYT,
Clerk of the District Court of the United States for the District of Nebraska.

Allowed by

W. H. MUNGER, *Judge.*
F. A. MOORE, *Deputy.*

22 [SEAL.] GEO. H. THUMMEL,
Clerk of the District Court of the United States for the District of Nebraska.
By JOHN NICHOLSON, *Deputy.*

Return to writ.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceeding in the within-entitled case, with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of said United States District Court for the District of Nebraska at Omaha, in said district, this 15th day of Sept., A. D. 1911.

[SEAL.] R. C. HOYT, *Clerk.*

23 (Indorsed:) No. 139, Doc. 0. United States District Court, District of Nebraska. United States of America, plaintiff, vs. William George, defendant. Writ of error, to the District Court of the United States for the District of Nebraska. Filed Sep. 15, 1911. R. C. Hoyt, clerk.

24 UNITED STATES OF AMERICA.

To William George, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Nebraska, sitting at Omaha, wherein the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Munger, judge of the United States District Court for the District of Nebraska, this 24th day of August, in the year of our Lord one thousand nine hundred and eleven.

WM. H. MUNGER,
Judge of the District Court of the United States for the District of Nebraska.

We acknowledge service of the foregoing citation this 25 day of August, 1911.

WESLEY L. WILCOX,
JOHN J. HALLIGAN,
Attorneys for defendant, William George.

25 No. 139. Docket O. United States District Court, District of Nebraska. United States of America vs. William George. Citation. Filed Aug. 25, 1911. R. C. Hoyt, clerk.

26 Thereupon afterwards, to wit, on the 25th day of August, 1911, præcipe for record was filed in said case, which said præcipe is in words and figures following, to wit:

United States District Court, District of Nebraska.

UNITED STATES OF AMERICA
vs.
WILLIAM GEORGE.
} Præcipe for transcript. No. 139, Doc. O.

To the clerk of said court:

You will please make transcript of the record in the above-entitled cause for the United States Supreme Court, and include in said

transcript the following, viz: Presentment of indictment by grand jury, indictment, order for capias & fixing bond, bond of defendant, demurrer, order sustaining demurrer, petition for writ of error, assignment of errors, order allowing writ of error, bill of exceptions, writ of error & citation.

F. S. HOWELL, *United States Attorney.*

Endorsed: Filed Aug. 25, 1911, R. C. Hoyt, clerk.

27 Certificate.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, R. C. Hoyt, clerk of the District Court of the United States for the District of Nebraska, hereby certify that, pursuant to the foregoing writ of error and in obedience thereto, and in compliance with the præcipe (a copy of which is found on page —— hereof), the foregoing record has been made, and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said court, as mentioned in said præcipe and as indicated in the foregoing index, in the case of the United States of America vs. William George, No. 139, Docket O, and that copies of writ of error and citation, duly certified, have been lodged and remain in my said office as such clerk.

Witness my hand and the seal of said court at Omaha, in said district, this 15 day of Sept., 1911.

[SEAL.] R. C. HOYT,
Clerk U. S. District Court, District of Nebraska.

28 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Wm. H. Munger, United States district judge for the district of Nebraska, hereby certify that R. C. Hoyt, who signed the foregoing certificate, was at the time of signing the same and is now clerk of the District Court of the United States for the District of Nebraska, duly commissioned and qualified; that said court is a court of record; that said clerk has by law the custody of the records and seal of said court.

That said attestation is in due form and by the proper officer according to law, and that the above signature of said clerk is genuine.

Witness my hand, at Omaha, in said district, this 15 day of Sept., 1911.

WM. H. MUNGER, *Judge.*

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, R. C. Hoyt, clerk of the District Court of the United States for the District of Nebraska, said court being a court of record, do hereby certify that the Honorable Wm. H. Munger, whose name is sub-

scribed to the foregoing certificate, was at the time of the signing thereof and now is judge of the District Court of the United States for the District of Nebraska, duly commissioned and qualified, and that the said signature is genuine.

In witness whereof I have signed my name and affixed the seal of said court at my office in the city of Omaha, district of Nebraska, this 15 day of Sept., 1911.

[SEAL.] R. C. HOYT, *Clerk.*

(Indorsement on cover:) File No. 22891, Nebraska D. C. U. S. Term No. 442. The United States, plaintiff in error, vs. William George. Filed October 6th, 1911. File No. 22891.

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No. 442.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES, *Plaintiff in Error,*

v.

WILLIAM GEORGE, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, moves that this case (as it is here under the Criminal Appeals Act) be advanced for early hearing, and, as the question involved is simple, that it be placed on the *summary docket.*

George was indicted for swearing falsely in support of his own homestead entry to certain matters relating to the establishment of his residence on the lands entered, to improvements made by himself thereon, and to the inquiry as to his continuous residence thereon, in violation of section 5392 of the Revised Statutes, which is the perjury section, and section

2291, as amended by the act of March 3, 1877, 19 Stat. 403.

Section 2291 requires that in order to acquire a patent to the lands entered "the person making such entry" must prove "by two credible witnesses" the matters referred to in the indictment.

A demurrer was sustained on the ground that there is no law of the United States which required George, as claimant, in making his homestead proof, to testify with reference to the matters set forth in the indictment, the court going on the theory that section 2291 in requiring proof of these matters by two credible witnesses means that there shall be two credible witnesses *other* than the claimant and does not authorize him to testify in his own behalf with reference thereto. Therefore, it was held, he could not be guilty of perjury under section 5392. There is thus involved a construction of the statute upon which the indictment is founded.

Notice of this motion has been given opposing counsel.

WM. MARSHALL BULLITT,
Solicitor General.

DECEMBER 23, 1912.

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In the Supreme Court of the United States.

OCTOBER TERM, 1912. No. 442.

THE UNITED STATES, *Plaintiff in Error,*

v.

WILLIAM GEORGE, *Defendant in Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF FOR THE UNITED STATES.

The lower court sustained a demurrer to an indictment for perjury. The question involved is whether there is any law of the United States which authorizes a *homestead claimant* to make an oath as to his residence on, and cultivation of, the lands entered, so as to support a prosecution for perjury if he swore falsely.

The lower court held that the oath made by the defendant was not authorized by any law of the United States.

The Government insists that a regulation of the General Land Office requires the oath and is such a "law" of the United States as authorizes the oath, so as to support an indictment for perjury under R. S. 5392 if the oath so made is false.

STATEMENT OF THE CASE.

The indictment for perjury alleges the following facts:

The defendant William George, as a homestead claimant, made a proof and final entry for certain lands; and on February 17, 1906, swore before the acting register of the United States land office at North Platte, Nebraska, that he (George) established his residence on the lands in question in April, 1901, and had ever since continuously resided thereon, made certain improvements, cultivated the land, etc., whereas in fact the statements were false in that he had never established a residence nor made any improvements thereon, nor cultivated the land, etc. (R. 2, 3).

The lower court sustained a demurrer to the indictment upon the ground that there was no law of the United States which authorized the homestead claimant to make the oath, and therefore his false oath did not constitute perjury (R. 6, 10, 11). This writ of error was taken under the criminal appeals act.

ASSIGNMENT OF ERRORS.

The seven errors assigned raise the simple question whether under the laws of the United States there is any valid requirement for the homestead claimant himself (as distinguished from other supporting witnesses) to make oath as to his residence, improvements, cultivation, etc., in connection with proof and final entry for a homestead (R. 7, 8).

ARGUMENT.

FIRST POINT.

Sworn testimony from a homestead claimant himself as to residence and cultivation is authorized by law within the meaning of R. S., sec. 5392, so that perjury may be predicated on the falsity of the testimony.

Revised Statutes, section 5392, the general perjury statute, provides that—

> Every person who, having taken an oath before a competent tribunal, officer, or person, in any case *in which a law of the United States authorizes an oath to be administered*, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished, etc.

The homestead laws provide (Revised Statutes, sec. 2291, as amended):

> * * * if * * * the person making such entry * * * proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years * * * and makes affidavit that no part of such land has been alienated * * * and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they * * * shall be entitled to a patent.

The present indictment was *not* based on sec. 2291, for it seems probable that the "two credible witnesses" there provided for mean two persons *other* than the claimant himself. Therefore, we must seek elsewhere for the authority in law for the claimant to make the oath as to his residence on, and cultivation of, the land he seeks to homestead. That authority is found in the Regulations that have been in force for thirty-five years without being questioned, and which were adopted pursuant to the following express statutory authority.

Revised Statutes provide—

> SEC. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.
>
> SEC. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> * * * * *
>
> Second. The public lands * * *
>
> SEC. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land,

and the issuing of patents for all grants of land under the authority of the Government.

SEC. 2246. The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

SEC. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

Section 2289 *et seq.* then provide for claimants entering certain public lands as homesteads, etc.

Pursuant to the foregoing authority the Commissioner of the General Land Office issued a circular dated July 17, 1878, addressed "To Registers and Receivers, United States Land Offices," transmitting new forms for taking final homestead proof and calling attention to the change whereby "the *claimant* will be required to testify, as a witness, in his own behalf in the same manner" as supporting witnesses are required by R. S. 2291.

The circular and the accompanying form of affidavit (as from time to time amended) are a part of the "mass of that body of public records of which the courts take judicial notice" (*Caha* v. *United*

States, 152 U. S. 211, 221, 222), and the material parts thereof are set out in the margin.[1]

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[1] (Circular.)

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 17, 1878.

To Registers and Receivers, United States Land Offices.

GENTLEMEN: Under the instructions of the honorable Secretary of the Interior, dated January 28, 1878, new forms have been prepared for taking preemption and final homestead proof.

The principal change from the old method of taking the proof, directed by the Secretary, is, that hereafter the testimony of the witnesses must be taken separately by question and answer, *and the claimant will be required to testify, as a witness, in his own behalf in the same manner.*

The printed forms, ten in number, which will be mailed to you, are named below, with such directions as are deemed necessary for your guidance, to wit:

* * * * *

FINAL HOMESTEAD PROOF.

* * * * *

Testimony of claimant, as a witness in his own behalf, by questions and answers.

Testimony of witnesses by questions and answers. The law requires the proof of two witnesses in each case, and you will require that the witnesses testify separately, as indicated by the forms.

* * * * *

In accordance with the instructions of the honorable Secretary of the Interior, you are directed to exercise great care and diligence in each case, and should it come to your knowledge, or should you have reasonable grounds to believe, that fraud or perjury has been committed in any case, make due report to this office without delay. Although knowledge of bad faith in cases may be obtained by you subsequent to the issue of certificate as the basis of patent, by promptly report-

In the following Government publications may be found the form of affidavit required to be made by

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ing as directed, the successful consummation of fraud, in some instances, may be prevented.

You will observe that the forms for taking the testimony contain a notice, which should be brought to the attention of each witness, stating that if he testifies falsely he will be prosecuted to the full extent of the law.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

4—369.

HOMESTEAD PROOF—TESTIMONY OF CLAIMANT.

....., being called as a witness in his own behalf in support of homestead entry, No. ....., for ..... testifies as follows:

Ques. 1. What is your name, age, and post-office address?

Ans. .....

Ques. 2. Are you a *native-born* citizen of the United States, and if so, in what State or Territory were you born?*

Ans. .....

Ques. 3. Are you the identical person who made homestead entry, No. ....., at the ..... land office on the ..... day of ....., 18.., and what is the true description of the land now claimed by you?

Ans. .....

Ques. 4. When was your house built on the land and when did you establish actual residence there? (Describe said house and other improvements which you have placed on the land, giving total value thereof.)

Ans. .....

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* (In case the party is of foreign birth a certified transcript from the court records of his declaration of intention to become a citizen, or of his naturalization, or a copy thereof, certified by the officer taking this proof, must be filed with the case. Evidence of *naturalization* is only required in final (*five-year*) homestead cases.)

the claimant himself pursuant to the original circular of July 17, 1878, and amendments therein similarly

Ques. 5. Of whom does your family consist; and have you and your family resided continuously on the land since first establishing residence thereon? (If unmarried, state the fact.)

Ans. .....

Ques. 6. For what period or periods have you been absent from the homestead since making settlement, and for what purpose; and if temporarily absent, did your family reside upon and cultivate the land during such absence?

Ans. .....

Ques. 7. How much of the land have you cultivated each season, and for how many seasons have you raised crops thereon?

Ans. .....

Ques. 8. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business?

Ans. .....

Ques. 9. What is the character of the land? Is it timber, mountainous, prairie, grazing, or ordinary agricultural land? State its kind and quality, and for what purpose it is most valuable.

Ans. .....

Ques. 10. Are there any indications of coal, salines, or minerals of any kind on the land? (If so, describe what they are, and state whether the land is more valuable for agricultural than for mineral purposes.)

Ans. .....

Ques. 11. Have you ever made any other homestead entry? (If so, describe the same.)

Ans. .....

Ques. 12. Have you sold, conveyed, or mortgaged any portion of the land; and if so, to whom and for what purpose?

Ans. .....

Ques. 13. Have you any personal property of any kind elsewhere than on this claim? (If so, describe the same, and state where the same is kept.)

Ans. .....

authorized from time to time: Donaldson's The Public Domain, Government Printing Office, 1884, pp. 1017, 1019, 1025, 1038; Circular from the General Land Office issued January 25, 1904, Government Printing Office, p. 279; Senate Document No. 396,

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Ques. 14. Describe by legal subdivisions, or by number, kind of entry, and office where made, any other entry or filing (not mineral), made by you since August 30, 1890.

Ans. .....

(Sign plainly with full christian name.)

.....

I hereby certify that the foregoing testimony was read to the claimant before being subscribed, and was sworn to before me this ..... day of ....., 190.., at my office at ..... in ..... County, ...

[See note below.] .....

.....

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

TITLE LXX.—*Crimes.*—*Ch. 4.*

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See § 1750.)

part 3, 59th Congress, 2d session, issued February 26, 1907, entitled "Rules and Regulations Governing the Department of the Interior," p. 733.

The defendant, George, gave his testimony in the shape of answers to the questions prescribed in the form. (Rec., 2: Cf. with the form of claimant's homestead proof.)

The oath was taken before George E. French, of North Platte, Nebraska, register of the United States land office at said town, and by R. S., 2234, 2246, 2256, it is provided that there shall be a register of the land office of North Platte, Nebraska, and that—

> The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands.

The indictment in apt terms alleges the materiality and falsity of the testimony given, etc. (R., 2, 3.)

The crime of perjury as defined by R. S., 5392 (p. 3, *supra*), is thus fully made out because the following propositions are well settled by this court:

1. A proceeding before an administrative officer such as is referred to in this indictment is a *case* in which false swearing may be perjury within section 5392. (*Caha* v. *United States*, 152 U. S. 211.)

2. A *valid* administrative rule requiring an oath is a "law of the United States" within section 5392, so

that perjury may be predicated on the falsity of such oath. (*Caha* v. *United States, supra.*)

The only possible question is whether the regulation requiring a homestead claimant to give testimony as to residence and cultivation is valid.

The principles under which this is to be determined are well settled. An executive regulation is valid (1) if the executive officer who issued it has statutory authority to make that sort of rule, (2) if the rule itself is in pursuance or enforcement of some law and is not contrary to any provision of law, and (3) if no delegation of legislative power is involved. (*United States* v. *Grimaud,* 220 U. S. 506; *Williamson* v. *United States,* 207 U. S. 425; *Caha* v. *United States,* 152 U. S. 211; *United States* v. *Bailey,* 9 Pet. 238.)

Applying these principles here:

(1) *The Commissioner of the General Land Office was authorized by law to make, under the direction of the Secretary of the Interior, the sort of regulation here in question.*

The several sections of the Revised Statutes set out above (pp. 4–5, *supra*) contain a general authority for the commissioner to make regulations with respect to the public lands, and section 2246 is a plain recognition of his authority to require oaths in connection with the entry and purchase of any tract. It remains to show that the particular regulation is appropriate and that it is not otherwise either prohibited or specially provided for by law.

(2) *The regulation is appropriate; it is in pursuance and enforcement of section 2291; its purpose is not otherwise specially provided for; and it is not contrary to any provision of law.*

Section 2291, as seen above, requires a homestead claimant to prove by two credible witnesses that he has resided on and cultivated the land entered for five years. The regulation does not attempt to constitute the entryman himself one of these witnesses. It has no such purpose. Testimony is still required from the two others and always has been, as is seen from the commissioner's circular of July 17, 1878.[1]

The forms sent out are specially prepared to take the testimony of these two as well as of the claimant.

Nor is it intended to add simply an additional witness performing the same function. The purpose is quite different. It is to test the statements of the other witnesses. Section 2291 requires proof of residence and cultivation by "two *credible* witnesses." But how is this credibility to be determined? This is for the Department of the Interior, and for it alone. It is its duty to make the determination as well as possible; for a grant of the public domain is at stake. Obviously an elaborate test would be impracticable; there must be something easy and summary and yet presumably reliable. What better method than to question closely the one man who above all others must have the most intimate

[1] See p. 6, supra.

knowledge of the facts on which the testimony of the two witnesses is sought, and who is most likely to be present anyway at the time of making proof?[1]

That this was the purpose of the requirement is apparent from the Secretary of the Interior's direction to the Commissioner of the General Land Office to prepare the new printed forms for final homestead proof. (Letter from Mr. Schurz, Secretary of the Interior, to the Commissioner of the General Land Office, January 28, 1878.)

It reads in part as follows:

> It is, each day, becoming more and more apparent to the officers connected with the administration of our land laws, that gross frauds are being perpetrated on the Government by persons who obtain patents for lands under the Homestead and Pre-emption laws. This, in a great measure, is accomplished by means of false swearing, on the part of witnesses, who appear before the officers authorized to take final proof, at the time of making said proof, and testify in relation to the legal qualifications of the applicant, and his compliance with the provisions of said laws.
>
> This testimony is usually in the form of *ex parte* affidavits, in many instances prepared by the local officers, or their employes, and

[1] The claimant must make his affidavit of nonalienation and allegiance in any event (section 2291), as well as present the testimony of his two witnesses, and he must do all this in person. See Circular from the General Land Office, *etc.*, of 1904, *supra*, p. 15. So he would be present, irrespective of the taking of the testimony here in question.

> it is apparent, in many cases, that the subscribing witnesses are either ignorant of the exact contents of the affidavits signed by them, or that they swear to a statement of facts of which they have no personal knowledge.
>
> In order to prevent, as far as possible, the perpetration of frauds of this kind in the future, you are instructed to prepare blank forms to be transmitted to each local office, prescribing the questions to be propounded to each witness, *including the applicant for the land.* These forms must be used in all cases where final proof is submitted under the homestead or pre-emption law. * * *
>
> The employes of your office should be instructed to give careful scrutiny to the papers in each case, and should discrepancies be discovered, the case should be suspended until the same are satisfactorily explained, or should they have good reason to believe that false testimony has been given, the case should be brought to your attention for proper action. The employes will be held to a strict accountability for the proper discharge of their duties in these particulars.

It was in pursuance of this letter that the circular of July 17, 1878, referred to above, was issued and the new forms prepared.

Clearly then this executive regulation is an appropriate one to enforce section 2291 and it meets the condition of section 2478 that its function is nowhere else specially provided for by law.

Nor can it in any respect be said to be contrary to law. Just here the case is clearly distinguishable from *Williamson* v. *United States*, 207 U. S. 425. There the question was of the validity of a regulation which purported to be in pursuance of the Timber and Stone Act of June 3, 1878, 20 Stat. 89. That act required an applicant for land under it to swear at the outset, among other things, to the good faith of his application and to his not having made any contract touching the title. Later, for final proof, another sworn statement was required by the act, but nothing was said about good faith or the disposition of the title at that time. The Commissioner of the General Land Office, however, made a regulation requiring an oath on these matters at final proof.

This court held that while oath as to such matter was required on the original application, yet, as the act made no mention of them among the requirements for final proof, it must have been intended that *after* his original entry and pending final proof the applicant should be permitted to sell his interest. The effect of the commissioner's regulation, therefore, would have been to deprive him of this right, since he could exercise it only by perjuring himself at the final proof. In other words, it may be said the regulation would have destroyed a substantive right under the act. So it was held invalid, and the prosecution for violation thereof fell with it.

Here the situation is quite the reverse. Everything the homestead claimant is asked to testify to

must in any event be proven before he is entitled to a patent. This is, in effect, as positive a declaration of law that the claimant must actually do these things as though section 2291 had expressly so provided instead of providing, as it does, merely that he must prove he did them. (*Anderson* v. *Carkins*, 135 U. S. 483.) So in contrast with the *Williamson* case, the regulation here deprives him of no right which the law by any sort of implication confers upon him; it asks him to testify to nothing which the law does not require him to prove somehow. This is the negative side of the inquiry as to its validity. The positive side has already been disposed of; for we have shown it to be appropriate to the enforcement of a provision of section 2291 not otherwise provided for. It should therefore be given effect.

(3) *No delegation of legislative power is involved.*

This may be regarded as a separate element in the inquiry. But no extended discussion is necessary. Remembering its function as shown above, the regulation here in question has to do with a detail of enforcing the land laws that is peculiarly of the sort that may be left to the administrative branch of Government. It is quite enough here simply to refer to the *Grimaud*, *Caha* and *Bailey* cases (p. 11, *supra*).

To what has been said there is to be added the weight of the fact that this regulation was first promulgated in 1878 and has been enforced and acquiesced in ever since. It constitutes an administrative department's interpretation of the power con-

ferred on it by section 2291 and the other sections, and this now has the force of thirty-five years' standing. With such a sanction it would need much stronger grounds than any that can be advanced here to overthrow even a regulation not so clearly and positively justified as this one is.

SECOND POINT.

This court has jurisdiction to consider the view of the case herein advanced.

It may possibly be objected that since the bill of exceptions (in reciting that the court below based its decision on a construction of the law upon which the indictment was founded) mentions specifically only sections 5392 and 2291 and not the other sections, 441, 453, 2246, and 2478, nor the regulation, this court (under the peculiar limitations of the criminal appeals act) can only look to see if sections 5392 and 2291 have been erroneously construed and must disregard the others.

Such a contention is not tenable.

1. It further appears that the decision was "that there is *no* law of the United States" requiring the particular sworn testimony referred to in the indictment. (R., 10.) This, of course, is a construction of the meaning of a clause in section 5392—the statute on which the indictment is founded—and, necessarily, to test that construction resort must be had to the whole body of the law of the United States. So if our FIRST POINT has been successful it has shown

that the lower court was in error in its construction of section 5392.

2. It may be added that the bill of exceptions is fairly susceptible of the interpretation that the lower court actually considered the other sections anyway.

The other sections and the regulation are necessarily drawn into the case in getting at the effect and meaning of the word *credible* in section 2291. This is apparent simply from the discussion under our first point.

3. When a demurrer to an indictment is sustained there is no necessity of a bill of exceptions.

The question appears on the face of the record, and there is no matter that is needed to be preserved by a bill of exceptions. A bill of exceptions in such a case is, as was remarked by Mr. Justice Day upon the oral argument in the *United Shoe Machinery Company Case* (*United States* v. *Winslow*, 227 U. S. ——), "something of a curiosity in legal literature."

However useful such a bill of exceptions may be in some cases for the purpose of showing just what construction the lower court placed upon some statute, it is equallv obvious that the lower court can not, by filing such a bill of exceptions, take away or limit the right of the United States to appeal if on the demurrer there was in fact involved the construction of some statute of the United States. In other words, if the indictment is good under statute A, the lower court, by correctly holding that the indictment is bad under statute B (and refusing to construe statute A at all), can not take away the

right of the United States to appeal to this court and get a decision as to whether or not the indictment can be sustained under statute A. The sustaining of a demurrer to an indictment is in and of itself the equivalent of a construction of the whole body of Federal statutes to the effect that they do not authorize the indictment.

The confusion as to the proper construction of the criminal appeals act should be removed. The true principle governing the right of the United States to appeal thereunder is as follows:

First. The construction which the lower court places upon the language used in the indictment, that is to say, with what acts the defendant is charged, is conclusive upon this court, and this court must accept the lower court's construction as to what are the acts which the defendant is alleged to have done or omitted to do.

Second. This court may correct any erroneous construction which the lower court may place upon a Federal statute, whether such construction be in the opinion of the lower court or set forth in a bill of exceptions.

Third. If the lower court simply sustains a demurrer to the indictment without any opinion, such action can not take away the right of the United States to have this court pass upon the question whether or not under the laws of the United States the indictment is good.

Fourth. As a corollary to the last proposition, it follows that if the lower court correctly construes one

statute of the United States and holds that the indictment states no offense thereunder, but fails to say anything about another statute of the United States under which the indictment might perhaps be sustained, the Government has the right to have this court say whether or not the indictment can be sustained under such last-named statute.

The judgment below should be reversed.

WM. MARSHALL BULLITT,
Solicitor General.

FEBRUARY 17, 1913.

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Supreme Court of the United States

OCTOBER TERM, 1912.

No. 442.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM GEORGE, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

H. C. BROME
W. T. WILCOX
J. J. HALLIGAN,
Attorneys for Defendant in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1912.

THE UNITED STATES,
Plaintiff in error.

vs.

WILLIAM GEORGE,
Defendant in error.

NO. 442.

In Error to the District Court of the United States For the District of Nebraska.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

William George was a homestead entryman, having a homestead entry on the southwest quarter (SW¼) of section twelve (12), township twelve (12) north of range twenty-seven (27) west of the 6th P. M. in Lincoln County, Nebraska, and as such entryman he attempted to make final proof be-

fore the United States land office at North Platte, Nebraska, on the 17th day of February, 1906, before George E. French, register of said land office.

In making such proof he swore and subscribed to an affidavit, describing his residence on said land, and his cultivation and improvements thereon, and also that he had not alienated any part of said land, and that he would bear true allegiance to the government of the United States.

On the 19th day of October, 1906, he was indicted for perjury in making said affidavit, and in said indictment it is charged that he swore falsely in the following particular.

Quoting from the indictment:

"Whereas in truth and in fact said homestead proof-testimony of claimant, so sworn to and subscribed as aforesaid by the said William George, was false and untrue in this, that the said William George had not established a residence on said homestead in April, 1901, or at any other date, and did not build a house on said homestead and establish a residence therein in April, 1901, or at any other date; that it is not true that the said William George had improvements consisting of a frame house 12 by 14 feet, frame barn, well and windmill, tanks chicken house, hogpens, one-half mile two-wire fence, of the value of $300.00 upon said homestead, or any improvements whatsoever thereon; that it is not true, as stated in said homestead proof-testimony of claimant, that said William George had continuously resided on said land since first establishing residence thereon and his family have resided there since his marriage; that it is not true that the said William George had been absent from this land only about one month, in August each year, and at different times each winter when baling hay, said absences extending over a period of about two months, but in truth and in fact the said William George never established any residence or settlement at any time on said homestead, but lived and resided elsewhere continuously from the time of entering said homestead until the date of final proof; that the improvements on said homestead were not worth the sum of $300.00, or any other

sum of money whatever and there was no house, barn, well, windmill, tanks, chicken house, hogpens, one-half mile of wire fence whatever upon said homestead."

It is charged in the indictment that said false affidavit was taken in a proceedings wherein the law of the United States authorizes an oath to be administered.

It is the contention of the defendant in error, George, that the laws of the United States did not authorize an oath to be administered to him (George) concerning his residence his cultivation or his improvements on said land.

It is further the contention of the defendant in error, George, that the laws of the United States required him to prove these things, to-wit: his residence, his cultivation and his improvements, by two credible witnesses, other than himself.

It is further the contention of the defendant, George, that the only things required by the laws of the United States to be sworn to by him were:

1. That no part of the land sought to be patented had been alienated.

2. That he would bear true allegiance to the government of the United States.

Section 2291 of the revised statutes of the United States is the act of congress, which prescribes the mode and what the entryman shall swear in making proof, and what his witnesses shall prove, which section is as follows:

"No certificate, however, shall be given or patent issued therefore, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow, or in case of her death, his heirs or devisees, or in case of a widow making such entry, her heirs or devisees, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the

term of five years immediately succeeding the time of filing the affidavit, AND MAKES AFFIDAVIT THAT NO PART OF SAID LAND HAS BEEN ALIENATED except as provided in section 2288, AND THAT HE, SHE OR THEY WILL BEAR TRUE ALLEGIANCE TO THE GOVERNMENT OF THE UNITED STATES; in such case he, she or they, if at that time citizens of the United States, shall be entitled to a patent as in other cases, provided by law."

This is the act of June 21, 1866, and on March 3, 1877, an act amendatory of this act was passed, which is found in volume 6 at page 298 of the Federal Statutes Annotated. This amendment is as follows:

"That the proof of residence, occupation or cultivation, the oath of non-alienation and the oath of allegiance, required to be made by section 2291 of the revised statutes, may be made before the judge, or in his absence, before the clerk of any court of record of the county and state, or district and territory, in which the lands are situated; * * * and the proof, AFFIDAVIT AND OATH, when so made and duly subscribed, shall have the same force and effect, as if made before the register and receiver, of the proper land district;" * * * section 2 of said act, being as follows:

"That if any witness making such proof, OR SAID APPLICANT MAKING SUCH AFFIDAVIT OR OATH, swears falsely as to any material matter contained in said proof, AFFIDAVIT OR OATH, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury, shall be liable to the same pains and penalties as if sworn falsely before the register."

Section 2294 of the revised statutes of the United States, volume 6, page 304, of the Federal Statutes Annotated, is an act of congress designating other officers before whom proof can be made. This was an amendment passed March 11, 1902, the material party of which is as follows:

"That hereafter all affidavits, proof and oaths of any kind, whatever, required to be made by the applicants and entrymen, under the homestead * * * acts, may in addi-

tion to those now authorized to take such affidavits, proofs and oath, be made before any United States commissioner. * * * Provided * * * That if any witness making such proof, OR ANY APPLICANT MAKING SUCH AFFIDAVIT OROATH, shall knowingly, willfully or corruptly swear falsely to any material matter contained in said proofs, affidavits or oath, he shall be deemed guilty of perjury, * * *."

And on March 4, 1904, congress amended section 2294, which is found at page 358, volume 10, of the federal statutes, annotated, the material parts of which read as follows:

"Section 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert land and timber and stone acts, may in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising federal jurisdiction in the territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: (Provided) * * * That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register."

The law with reference to making final proofs on homesteads remained as above until the passage of the act known as the three year homestead act of June 6, 1912, by which section 2291 of the revised statutes was amended, as follows:

"No certificate, however, shall be given or patent issued therefore until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead, his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible wit-

nesses that he, she or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 2288, and that he, she or they will bear true allegiance to the government of the United States, then in such case he, she, or they if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

Section 2478 authorizes the commissioner of the general land office, under the direction of the Secretary of the Interior, to make rules and regulations to carry out the provisions of the public land laws, where such results and regulations have not been provided by congress, and which section is as follows:

"The commissioner of the general land office, under the direction of the Secretary of the Interior is authorized to enforce and carry into execution, by appropriate regulations every part of the provisions of this title NOT OTHERWISE ESPECIALLY PROVIDED FOR."

This section did not authorize the Secretary of the Interior or the Commissioner of the general land office to in any manner change section 2291, or any of the amendments thereof, by adding to or taking from said section, as that section especially provides what the homestead entryman shall swear, and what his witnesses shall swear. Section 2478 only authorized the commissioner of the general land office to make regulations where "NOT OTHERWISE ESPECIALLY PROVIDED FOR."

From 1866 to July 17, 1878, the homestead entryman was not required to testify as a witness in his own behalf, as to his settlement, his cultivation or his improvements, but on July 17th, 1878, the general land office issued the following instructions to all registers and receivers, which instructions are as follows:

"Gentlemen: Under the instructions of the Honorable Secretary of the Interior, dated January 28, 1878, new forms have been prepared for taking preemption and final homestead proof.

"The principal change from the old method of taking the proof, directed by the secretary, is, that hereafter the testimony of the witnesses must be taken separately by question and answer, and the claimant will be required to testify, as a witness, in his own behalf in the same manner."

No rule was ever adopted by the Secretary of the Interior or commissioner of general land office requiring this to be done, of which fact we think this Court will take judicial notice.

The defendant in error contends that in as much as congress especially provided in section 2291 what the homestead entryman should swear to, that the Secretary of the Interior or the Commissioner of the general land office had no power or authority under section 2478 to change the same, and require him to swear to more than in the sections provided.

ARGUMENT.

Section 2291 provides that the homestead entryman shall make affidavit THAT HE HAS NOT ALIENATED SAID LAND AND THAT HE WILL BEAR TRUE ALLEGIANCE TO THE GOVERNMENT OF THE UNITED STATES.

It was clearly the intention of congress that the homestead entryman should not be required to swear in his affidavit to anything but these facts, and that his witnesses were to prove his settlement, cultivation and improvements. That this was the understanding of congress of this section appears clearly from the amendatory act of June 21, 1866, wherein it provides for taking proofs before officers, other than registers and receivers of land offices, and in defining

punishment for falsely making such proof and affidavits, before such officers, the act provides:

> "That if any witness making such proof or any applicant making such affidavit or oath (affidavit of non-alienation and allegiance) swears falsely to any material matter contained in said proofs, affidavits or oath, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury."

This section draws a distinction between a witness making proof of residence, cultivation and improvements, and the applicant making an affidavit of non-alienation and allegiance, and a perusal of this section will show at once that it was not the understanding of congress when it passed section 2291, and the act amendatory thereof, on June 26, 1866, that the applicant himself should be required to make affidavit of anything more than non-alienation and allegiance.

The same distinction was drawn in section 2294 and it was not until June 6, 1912, that congress passed a law requiring the homestead entryman to make affidavit as to his residence, cultivation and improvements.

The act of Congress especially provides what the entryman shall make affidavit to in making his final proof, and the Secretary of the Interior has no authority to enlarge the act of congress, and require the entryman to swear to facts which the act provides shall be proven by two credible witnesses, and perjury cannot be based upon the oath of the entryman to facts which congress did not require him to make affidavit, but proof of which was required to be made by two other crediable witnesses.

Williamson vs. The United States, 207 U. S. 425.
Robnett vs. The United States, 169 Fed. 178.
Dwire vs. The United States, 170 Fed. 160.
Patterson vs. The United States, 181 Fed. 970.
United States vs. Howard, 37 Fed. 369.

United States vs. Bedgood, 49 Fed. 54.
Silver vs. The State, 17 Ohio 369.
United States vs. Maid, 116 Fed. 650.
United States vs. Eaton, 144 U. S. 678.

One of the most recent cases is the case of Williamson vs. the United States. In that case the defendant Williamson was indicted with others for conspiring to commit the crime of subornation of perjury in proceedings for the purchase of public lands, under the authority of the law commonly known as the timber and stone act. The indictment charged an unlawful conspiracy and combination to have been entered into and the object of the conspiracy was stated to be suborning of a large number of persons to go before a United States commissioner in proceedings for the entering and purchase of land in such district, under the timber and stone act, make oath before the official that the lands were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the exclusive use and benefit of such persons, and that they had not directly or indirectly made any agreement or contract in any way or manner, with any person by which the titles which they might acquire from the United States should enure.

The timber and stone act required the applicant to make a sworn statement, among other things, that he intended to appropriate the land to his own exclusive use and benefit, and that no agreement had been made, directly or indirectly, with any person or persons whomsoever, by which the title to be acquired from the government should enure, in whole or in part, to any other person than the applicant, and the section concludes by causing any false statement made in the sworn application to constitute the crime of perjury.

The law required the local land officer to post a notice

of the application in his office for sixty days; it required the applicant to publish such notice at his own expense for sixty days, and upon proof of publication and of certain facts, which the statute expressly enumerated the applicant upon the payment of the requisite charge, should be entitled to a patent for the land.

In the items the statute required the applicant to make proof, after showing publication, all requirements are omitted regarding the speculative purposes on the part of the applicant, or his bonafides, or his intentions to acquire the land for himself alone, and it is in these last particulars that the persons alleged to have been suborned to commit perjury, had sworn as to their bonafides, and the fact that they desired the land for their own exlusive use.

The exact question, therefore, is presented in the Williamson case that is presented here. The act of congress prescribed the facts to be sworn to by the applicant, when he made proof, after publication, under the timber and stone act. The Secretary of the Interior required the applicant to swear to additional facts, not required by the act of congress, but which were required by the act of congress to be sworn to when he made his original and first application.

In the opinion the Court says:

> "When the context of the statute is thus brought into view, we are of the opinion that it cannot possibly be held, without making by judicial legislation a new law, that the statute exacts from the applicant a reiteration, at the final hearing, of the declaration concerning his purpose in acquiring title to the land, since to do so would be to construe the statute as including in the final hearing that which the very terms of the statute manifestly was intended to be excluded therefrom. We say this, because, as the third section re-exacts in the final application a reiteration of some of the requirements concerning the character of the land made necessary in the

first application, and omits the requirement as to the bonafides, etc., of the applicant, it follows, under the elimentary rule that the inclusion of one is the exclusion of the other, that the re-exacting of a portion only of the requirements was equivalent to an express declaration by congress that the remaining requirements should not be exacted at the final proof. And this becomes particularly cogent when the briefness of the act is considered, when the propinquity of the two provisions is borne in mind—a propinquity which excludes the conception that the legislative mind could possibly have overlooked in one section the provision of a section immediately preceding —especially when in the last section some of the requirements of the prior section are re-expressed and made applicable to the final statement."

And later in the opinion the Court says:

"As, then, there was no requirement concerning the making in the final proof of an affidavit as to the particulars referred to, and as the entryman who had complied with the preliminary requirements was under no obligation to make such an affidavit, and had full power to dispose AD INTERIM of his claim upon the final issue of patent, we think the motive of the applicant at the time of the final proof was irrelevant, even under the broad rule which we have previously in this case applied, and therefore that error was committed not alone in instructing the jury that the indictment covered or could cover the procurement of perjury in connection with the final proof, and that the jury might base a conviction thereon, but in admitting the final proof as evidence tending to show the alleged illegal purpose in the primary application for the purchase of the lands."

We can see no difference in the case above cited and the case at bar. In the Williamson case the crime charged was suborning a man to commit perjury in swearing, when he made his final proof for timber lands, that he had not agreed to sell the lands, when the act prescribed by congress did not require him to swear to this fact, but did require him to swear to other facts.

In the case at bar the defendant, George, is charged

with perjury in swearing in his final proof that he resided on the lands from the time that he made his entry; that he made certain improvements and certain cultivation, when the act which prescribed the facts which George was required to swear to did not include these facts, but required him to swear to other facts, and did require these facts to be proven by two other credible witnesses.

The case of Robnett vs. The United States, 169 Fed. 178 supra, decided by the Circuit Court of Appeals of the Ninth circuit May 10th, 1909, is exactly in point with this case. The defendant was charged with suborning one, Robinson, to swear falsely to an affidavit in making proof, under the act of congress of June 3, 1878, providing for the sale of stone and timber land. The act itself provided "that the applicant in his affidavit should set forth that the land was unfit for cultivation, and valuable chiefly for timber and stone, that it was uninhabited; contained no mining or other improvements, except for ditch or canal purposes where any such exist." And also to state that there were no deposits of gold, silver, etc.

The blank forms furnished by the land department included these statements, and also the statement that his knowledge of the land was derived from personal examination of the land applied for, and that he knew from his own personal knowledge that it was unfit for cultivation. The Court held that the act of congress did not require that this knowledge should be gained from personal inspection, and that subornation of perjury could not be based on a charge that defendant induced the appli[illegible] to swear that he had personally examined the land and that from personal knowledge that the same was unfit for cultivation, as no such requirements were provided in the statute.

In the opinion the Court say:

"It is, of course, true that the land department cannot by any rule or regulation declare what shall constitute a crime, or make that a crime which by statute is not such. The subornation of perjury charged in the indictment in question relates to the statement of the applicant in respect to his personal examination of the land and his personal knowledge of the matters specified in the statute. Such statement in regard to his personal examination and personal knowledge was required only by the blank forms furnished by the land department. It was not even required by the rules and regulations adopted by that department, as will be seen from the circular from the general land office set out in the margin of the opinion of the Supreme Court in the Williamson case, at page 19.

"We are therefore of opinion that under the ruling of the Supreme Court in the case of Williamson vs. United States, 207 U. S. 425, 28 Sup. Co. 163, 52 L. Ed. 278. neither the personal examination of the land applied for by Robnet, nor his personal knowledge concerning it, was required, and hence that the indictment charges no crime against the plaintiff in error."

The case of Dwire vs. United States, 170 Fed. 161, supra is also in point, and the indictment was for subornation of perjury under the timber and stone act, charging in three counts the defendant with suborning an entryman to swear falsely in his final proof, that he had not made any contract by which the title to the land he was applying to purchase would enure to the benefit of any other person than himself. The Circuit Court of Appeals following the case of Williamson vs. United States, held that the indictment did not charge perjury.

We particularly desire to call the Court's attention to the cease of Patterson vs. the United States, 181 Fed. 970, Circuit Court of Appeals, Ninth circuit. In this case the indictment was for perjury committed by the defendant in an

application for a patent. The law being revised statute section 4[illegible] the applicant for the patent to swear "that he [illegible]elieves himself to be the original and first inventor, or discoverer of the art, machine, manufacture, composition or improvement for which he solicits a patent; that he does not know and does not believe that the same was ever before known, or used, and shall state of what country he is a citizen."

The commissioner of patents, with the approval of the Secretary of the Interior promulgated rule 46 providing that the applicant shall make oath of affirmation "that he does verily believe himself to be the original and first inventor or discoverer of the art," and also to state whether he is the "sole or joint inventor" of the invention claim in his application.

The Court will observe that the rule of the commissioner of patents required the applicant to state whether he was the sole or joint inventor, and the defendant in the case, in his affidavit for patent stated "that he verily believes himself to be the original, first and sole inventor of the improvement in buckles."

In deciding the case the Court says:

> "The testimony was such that the jury may have concluded that the buckle patented was the joint genius of the two, in which event they may, under the instruction of the court to which reference has been made, have found the plaintiff in error guilty as charged on the ground that he was not the "sole" inventor of the patented buckle; but, as has already been said, inasmuch as the statute did not require the applicant for such a patent to swear that he was, that circumstance constituted no element of the crime of perjury. For this error the judgment must be reversed, and the cause remanded to the court below for a new trial."

In another part of the opinion the Court says:

> "In the instance in hand, the statues had defined the

matters the willful false swearing to which is made to constitute the crime of perjury. Whether or not an applicant for a patent is the 'sole' inventor of the thing claimed is not among the elements of the crime denounced by the statute. Therefore false swearing in respect to that matter cannot be a crime."

And in another place in the opinion the Court says:

"Granted that such a requirement can be legally made by rule of the department in order to determine whether or not the applicant was alone entitled to the patent applied for, or only in conjunction with someone else, it by no means follows that the department can by any rule or regulation add any word or words to the statutory oath making that a crime which congress did not make such. The law is thoroughly well settled that crimes in such matters are such only as the statutes have defined and declared. (Citing) Williamson vs. United States, 207 U. S. 425; United States vs. Keitel, 211 U. S. 370; United States vs. Eaton, 144 U. S. 677; Morrill vs. Jones, 106 U. S. 466; United States vs. United Verde Copper Co., 196 U. S. 215; United States vs. Biggs, 211 U. S. 507 (and others)."

The logic in this case in the last paragraph applies to the case at bar. Congress prescribed what the homestead entryman should make affidavit to when he made his final proof.

The commissioner of the general land office with the approval of the Secretary of the Interior changed these requirements so as to include other things than those prescribed by congress, and in this indictment the defendant is charged with perjury in swearing falsely, not to what congress requires him to swear to, but what the commissioner of the general land office has added thereto in the affidavits he sends out and requires homestead entrymen to swear to in making their final proof.

We desire to quote from the syllabus in the case of United States vs. Maid, supra, and we think it concisely

states the law with reference to this matter:

> "To constitute the crime of perjury under Rev. St. No. 5392, by the making of a false affidavit in relation to an entry of public lands, it is essential that such affidavit should be material, and that it should be authorized by a law of the United States. Such a charge cannot be based upon an affidavit of the non-mineral character of the land made in support of a homestead entry, although a regulation of the land office requires such an affidavit to be made in certain states, since it is not required by Rev. St. No. 2290, which prescribes the contents of a homestead affidavit, and the statute cannot be added to for criminal purposes by a departmental regulation."

United States vs. Bedgood, 49 Fed. 54 was a prosecution for perjury committed in making final proof, upon a pre-emption entry, in which the defendant swore, among other things, as to his settlement, cultivation, and continuous residence, and improvements and the value of the same. Section 2259 revised statutes, under which the proof was made, required a person making proof on a preemption entry to swear "that he was not the owner of 320 acres of land in any state or territory; that he had not settled upon or improved such land to sell the same on speculation, but in good faith to appropriate it to his own exclusive use, and that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should enure, in whole or in part, to the benefit of any person except himself, and if any person taking such oath swears falsely in the premises he shall forfeit the money he may have paid for such land, and all right and title to the same." A demurrer was sustained in the indictment, in the following opinion:

> "The false affidavit and oath alleged in the indict-

ment to have been made by her, in no respect conforms to the statute. Section 2262. It does not contain what is required by that statute to be sworn to, but contains statements of fact that, so far as it provides, are wholly immaterial. The statute makes the existence of certain facts and requires certain declarations to be made and oath thereof by the applicant or claimant, prerequisites to securing the right of a preemptionist; and oath of other facts made by her in connection therewith, not required by law, however, false, is not perjury. The oath must be administered in a proceeding that is valid and regular. It must be authorized by law. The false testimony must be material and the oath must be administered by one having authority to administer it. (Citing) 2 Bish. Crim. Law, Secs. 982-984-991; Silver vs. State, 17 Ohio, 368; U. S. vs. Howard, 37 Fed. 666; U. S. vs. Manion, 44 Fed. 800; U. S. vs. Curtis, 107 U. S. 672; U. S. vs. Hall, 131 U. S. 50; State vs. Lloyd 46 N. W. 898."

In the case of the United States vs. Eaton, 144 U. S. 678, supra, the defendant, a wholesale dealer in olemargerine, was indicted. The charge being that he failed to keep books, showing a record of his dealings in olemargerine, and to re-report the details of such dealings to the Secretary of the Treasury. The act of congress approved August 2, 1886, relating to the subject provides: That every manufacturer of olemargerine shall file with the collector of internal revenue of the district within which his manufactory is located, such notices, inventories and bonds, shall keep such books, render such returns of materials and products, put up such signs, affix such number to his factory, and conduct his business under such surveillance of officers and agents, as the commissioner of internal revenue, with the approval of the Secretary of the Treasury, may by regulation, require.

The commissioner of internal revenue with the approval of the Secretary of the Interior on August 25, 1886, issued a regulation which provided:

"Wholesale dealers in olemargerine will keep a book (form 61) and make a monthly return on form 217 showing the olemargerine received by them and from whom received; also the olemargerine disposed of by them and to whom sold and delivered."

It will be observed that the act of congress provided that manufacturers of olemargerine should keep books and make returns, and, that the regulations required that wholesale dealers in olemargerine should keep such books.

The question, therefore, was whether the wholesale dealer in olemargerine who omitted to keep a book or to render the returns prescribed by the regulations was liable to the penalties prescribed by law, as having omitted or failed to do the thing, "required by law in the carrying on and conducting of his business," it was contended that section 161, which authorizes the head of any department of government "to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks the distribution and performance of its business, and the custody, use and preservation of the record, papers and property pertaining to it."

In the opinion the Court holds:

"It would be a very dangerous principle to hold that a thing prescribed by the commissioner of internal revenue, as a needful regulation under the olemargerine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in olemargerine, in such manner as to become a criminal offense punishable under 18 of the act; particularly when the same act, in 5, requires a manufacturer of the article to keep such books and render such returns as the commissioner of internal revenue, with the approval of the Secretary of the Treasury, may, by regulation require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article.

"It is necessary that a sufficient statutory authority should exist for declaring any act or omission a crimin-offense; and we do not think that the statutory authority in the present case is sufficient. If congress intended to make it an offense for wholesale dealers in olemargerine to omit to keep books and render returns as required by regulations to be made by the commissioner of internal revenue. It would have done so distinctly, in connection with an enactment such as above recited, made in 41 of the act of October 1, 1890.

"Regulations prescribed by the president and by the heads of departments, under authority granted by congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

In the case at bar the law provides what the homestead entryman who makes his final proof shall swear to in his affidavit, and we do not believe that the commissioner of the general land office with the approval of the Secretary of the Interior, by a mere change in the form of the affidavit which he prescribes such homestead entryman shall swear to can make additions to the requirements of the act of congress and make such additions a basis for a criminal prosecution.

If congress desired to require the homestead entryman to swear on his behalf to his residence, his cultivation and his improvements it would have so provided in the various amendments to section 2291.

And we desire practicularly to call the Court's attention that said section provides:

"That if any witness making such proof OR SAID APPLICANT MAKING SUCH AFFIDAVIT OR OATH (affidavit of non-alienation and allegiance to the United States government) swears falsely as to any material

matter contained in said proofs, AFFIDAVIT OR OATH the said false swearing being willful and corrupt he shall be deemed guilty of perjury."

In the very act in which congress prescribed that such entryman shall be deemed guilty of perjury, if he swears falsely in making his final proof, it limits such oath to two subjects, viz: non-alienation of the land, and that he will bear allegiance to the United States government, and we submit that the commissioner of the general land office with the approval of the Secretary of the Interior cannot by a mere change in the affidavit which he furnishes the applicant upon which to make his final proofs, add that which congress has expressly omitted and make the same a basis for a criminal prosecution.

In all of the amendments to the original act, of which there are several congress in each one maintains a distinction as to the subjects to be testified to by the claimant and his witnesses, limiting the claimant's testimony in each case to two subjects, viz: to non-alienation of the land, and that he will bear true allegiance to the United States government, down to the act of June 6, 1912, when congress by amendment changed the act and in the act of June 6, 1912, congress prescribed that the homestead entryman shall swear to non-alienation of the land and that he will bear true allegiance to the United States, and to his residence, his improvements and his cultivation. If the law as it existed down to the amendment of June 6, 1912, already provided that the homestead entryman should swear to these things, of what necessity was the amendment. The very fact that congress amended the original section passed in 1866 in this particular, after it had existed for a period of forty-six years, is certainly inconsistent with the contention that section 2291 already authorized and required the homestead entryman to swear to his residence,

his improvements and his cultivation.

The case at bar is not to be confounded with those cases wherein congress was expressly authorized executive departments to make rules to carry out the specific provisions of various acts, and which rules were not provided by congress itself. Conspicuous examples of those cases are:

United States vs. Grimaud, 220 U. S. 506.
United States vs. Nelson, 199 Fed. Rep. 464.

In the case of the United States vs. Grimaud, supra, the defendant was indicted for grazing stock upon a forest reservation, without the permit required by rule 45, promulgated by the Secretary of Agriculture. The act declared that it should not be construed to prohibit any person from entering upon such forest reservation for all proper and lawful purposes, including that of prosecuting, locating and developing mineral resources thereof; provided that such persons comply with the rules and regulations covering such forest reservations. The act also declared that the secretary might make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forest thereon from destruction; **and any violation of the provision of this act or such rules and regulations shall be punished, etc.**

In the nature of things it was impractible for congress to provide general regulations for these various and varying details of management, of these forest reserves, each one of which had its peculiar and special features, and congress did not attempt to prescribe rules and regulations governing the same, but authorized the Secretary of Agriculture to do so.

In distinguishing that case from the case of the United States vs. Eaton, supra, the Court says:

"But the very thing which was omitted in the oleomargine act has been distinctly done in the forest reserve act, which, in terms provides that 'any violation of the provisions of this act or such rules and regulations (of the secretary) shall be punished' as prescribed in section 5388 of the revised statutes as amended. * * *

"The Secretary of Agriculture could not make rules and regulations for any and every purpose. Williamson vs. United States, 207 U. S. 462, 52 L. Ed. 297, 28 Sup. Ct. Rep 163. As to those here involved, they all relate to matters clearly indicated and authorized by congress. The subjects as to which the secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the secretary, but by congress. The statute, not the secretary, fixes the penalty.

"The indictment charges, and the demurrer admits, that rule 45 was promulgated for the purpose of regulating the occupancy and use of the public forest reservation and preserving the forest. The secretary did not exercise the legislative power of declaring the penalty or fixing the punishment for grazing sheep without a permit, but the punishment is imposed by the act itself. The offense is not against the secretary, but, as the indictment properly concludes 'contrary to the laws of the United States and the peace and dignity thereof.''

The case of the United States vs. Nelson, supra, was decided by the District Court of the Northern District of Idaho, September 5, 1912, and arose under the forest reserve act. The defendant in that case was charged with perjury in making his application to enter 160 acres of land within the boundaries of the Coeur D'Alene national forest in Idaho, in which application he swore that he established residence upon and commenced the cultivation and improvement of the land prior to the time be made his application, and

which allegation is charged in the indictment to have been false, and that in truth and in fact the defendant had never occupied the land as a home

The defendant demurred to the indictment. In the opinion the Court distinguished this case from the case of United States vs. Williamson and United States vs. Eaton, and classes it with the case of United States vs. Grimaud, supra, and others. And in the opinion the Court states:

> "It may be conceded that there is some support, both in reason and the decided cases, for the view that, in the administration of the general homestead law, congress having, by section 2290, specifically prescribed the contents of the required affidavit, it is incompetent for the land department to impose upon the applicant additional conditions. 'Expressio unius est exclusio alterius.' United States vs. Maid, D. C. 116 Fed. 650. That point, however, it is unnecessary presently to decide; for it must be borne in mind that the application under consideration was not made under the general homestead laws alone. The lands were within the boundaries of the national forest, and by express provision of the act of June 11, 1906, authorizing their entry, they could be entered only in accordance with the general homestead laws and that act. That act conferred upon the defendant, if otherwise qualified, a perferable right to make entry over other qualified applicants, provided certain facts and conditions existed. To enable the officers properly to administer the law and accept the application of the person entitled to make the entry, it was requisite that they inform themselves concerning the existence of such facts. **No method of inquiry or form of procedure is pointed out by the law.**
>
> Section 2478 revised statutes is as follows:
>
> "The commissioner of the general land office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

Under the authority of this section, paragraph 17 of circular No. 10, issued by the general land office is as follows

"All applications by persons claiming as settlers, must in addition to the facts required in paragraph 17, state the date and describe the acts of settlement under which they claim a preferred right of entry," etc.

In discussing this provision the Court says:

"This appears to be an 'appropriate regulation' and therefore fully within the authority conferred by section 2478, empowering the officers charged with the responsibility of disposing of the public lands 'to enforce and carry into execution, by appropriate regulations,' provisions of law 'not otherwise specially provided for.' No valid reason is apparent, therefore. why the oath to the affidavit made by the defendant pursuant to this regulation should not be held to be an oath which, by necessary implication, is permitted by the laws of the United States to be administered."

In distinguishing that case from the case of Williamson vs. the United States, and Robnett vs. the United States, supra, the Court says:

"The affidavit here is not like that involved in the case of Williamson vs. United States, 207 U. S. 425, 28 Su Ct. 163, 52 L. Ed. 278, or Robnett vs. United States, 169 Fed. 778, 95 C. C. A. 244 where the sworn statement required by the regulations of the department were in contravention of the legal rights of the entryman, or were at least immaterial to such rights. In the Robnett case the Williamson case is followed, and the precise point decided in the latter case appears from the statement of the proposition made by Mr. Justice White, who rendered the decision as follows:

" 'It remains only to consider whether it was within the power of the commissioner of the general land office to enact rules and regulations by which an entryman would be compelled to do that at the final hearing which the act of congress must be considered as having expressly excluded, in order thereby to deprive the entryman of a right which the act, by necessary implication, conferred upon him. To state the question is to answer it.' "

On this point we content ourselves with the discussion

of the two cases just above cited. In those cases a distinction is clearly drawn between a case like the one at bar, the case of Williamson vs. the United States, Robnett vs. the United States and United States vs. Eaton, and some others.

The indictment in this case, however, does not charge that the perjury alleged was committed under the regulation of any department, but it charges that it was made in a proceedings wherein the laws of the United States authorizes an oath to be administered.

In the case of the United States vs. Grimaud, supra, the indictment charged, as is shown from the context of the opinion, that the affidavit was made by the defendant, therein, under the authority of rule 45, promulgated by the Secretary of Agriculture. The indictment in this case makes no such charge, and we think that the government cannot successfully contend that the allegations in the affidavit, alleged to be false, in the case at bar, were made by the authority of any rule of the general land office, or of the Secretary of the Interior, for the following reasons:

1. The indictment does not so charge.

2. No such rule was ever promulgated, as we have shown in the statement of this case.

We submit that the judgment of the Court sustaining the demurrer to the indictment is correct and that the same should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

UNITED STATES *v.* GEORGE.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

No. 442. Argued February 26, 1913.—Decided March 24, 1913.

Quære: whether the Criminal Appeals Act of March 2, 1907, does not require an explicit declaration of the law upon which the indictment is based and a ruling on its validity and construction; and whether on an appeal taken under that act the Government can seek to sustain the indictment as valid under other statutes than those relied upon in the trial court.

An indictment for perjury under § 5392, Rev. Stat., cannot be based on an affidavit not authorized or required by any law of the United States.

Sections 161, 441, 453, 2246 and 2478, Rev. Stat., confer administrative power only on the Secretary of the Interior and the officers of the Land Department. They do not confer legislative power.

There is a distinction between legislative and administrative functions, and under a statutory power to make regulations an administrative officer cannot abridge or enlarge the conditions imposed by statute.

Section 2291, Rev. Stat., prescribes what a homestead claimant and the witnesses are required to make oath to and the Secretary of the Interior has no power to enlarge these requirements.

A charge of crime against the United States must have clear legislative basis.

A homestead claimant making an affidavit not required by § 2291, Rev. Stat., is not guilty of perjury under § 5392, Rev. Stat., although the affidavit was demanded by the Land Office in pursuance of a regulation made by the Secretary of the Interior.

THE facts, which involve the construction of § 5392, Rev. Stat., and the validity of an indictment thereunder for perjury, are stated in the opinion.

Mr. Solicitor General Bullitt for the United States:

Sworn testimony from a homestead claimant himself as to residence and cultivation is authorized by law within

the meaning of Rev. Stat., § 5392, so that perjury may be predicated on the falsity of the testimony.

The indictment is based on a regulation of the General Land Office. See Circular of Commissioner of General Land Office, dated July 17, 1878. *Caha* v. *United States*, 152 U. S. 211, 222.

The regulation of the General Land Office was fully authorized by statute. Rev. Stat., §§ 161, 441, 453, 2246, 2478, 2289 *et seq.*

The regulation is appropriate and in pursuance of the enforcement of Rev. Stat., § 2291. See letter of Secretary of Interior to Commissioner of General Land Office, January 28, 1878.

There is no delegation of legislative power. *United States* v. *Grimaud*, 220 U. S. 506; *Williamson* v. *United States*, 207 U. S. 425; *Caha* v. *United States*, 152 U. S. 211; *United States* v. *Bailey*, 9 Pet. 238.

This court has jurisdiction to consider the view of the case herein advanced.

Mr. J. J. Halligan, with whom *Mr. H. C. Brome* and *Mr. W. T. Wilcox* were on the brief, for defendant in error:

The act of Congress especially provides what the entryman shall make affidavit to in making his final proof, and the Secretary of the Interior has no authority to enlarge the act of Congress, and require the entryman to swear to facts which the act provides shall be proven by two credible witnesses, and perjury cannot be based upon the oath of the entryman to facts which Congress did not require him to make affidavit, but proof of which was required to be made by two other credible witnesses. *Williamson* v. *United States*, 207 U. S. 425; *Robnett* v. *United States*, 169 Fed. Rep. 178; *Dwire* v. *United States*, 170 Fed. Rep. 160; *Patterson* v. *United States*, 181 Fed. Rep. 970; *United States* v. *Howard*, 37 Fed. Rep. 369; *United States* v. *Bed-*

good, 49 Fed. Rep. 54; *Silver* v. *State*, 17 Ohio, 369; *United States* v. *Maid*, 116 Fed. Rep. 650; *United States* v. *Eaton*, 144 U. S. 678.

The case at bar is not to be confounded with those cases wherein Congress has expressly authorized executive departments to make rules to carry out the specific provisions of various acts, and which rules were not provided by Congress itself. Conspicuous examples of those cases are: *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Nelson*, 199 Fed. Rep. 464.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment for perjury,[1] by which defendant in error (herein referred to as defendant) is charged with falsely and corruptly taking his solemn oath in a proceeding wherein a law of the United States authorized an oath to be administered before the register of the United States land office at North Platte, Nebraska, the proceeding being the making of proof and final entry of a homestead claim of certain described lands.

The indictment charges that defendant took an oath and subscribed the same and deposed thereby that he built a house and other improvements on the land, which he described and stated their value to be $300.00, and established his residence thereon in April, 1901. The dimensions of the house and other improvements were stated. He further deposed that he had continuously

[1] Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished, etc.

resided on the land after he had established his residence thereon, and his family after his marriage in 1902, with the exception of certain absences which were stated.

These facts, it is alleged in the indictment, were matters of material inquiry of the good faith of the defendant in perfecting his homestead entry. The indictment explicitly negatived the facts so deposed by defendant and charged that he "was not acting in good faith in making said entry and final proof as a home for himself, but in fact to defraud the United States out of the use, title, and possession of said land."

Defendant demurred to the indictment and stated as grounds thereof (1) that it failed to state or charge any crime under the laws of the United States. (2) That there was no law of the United States which required defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment, the law of the United States requiring that the facts be proved by two credible witnesses other than the claimant, and did not authorize the claimant to testify in his own behalf with reference thereto.

The demurrer was sustained, and the case was then brought here under the Criminal Appeals Act.

It will be observed that the indictment charges that the oath was taken in a proceeding wherein a law of the United States authorized an oath to be administered. Whether it was is the question in the case; and we are brought to the inquiry as to what law of the United States authorized the oath. To this inquiry the record discloses divergent answers on the part of the Government. In the District Court it was the view and contention of the Government that the indictment was founded on § 5392 of the Revised Statutes and § 2291, as amended by the act of March 3, 1877, c. 122, 19 Stat. 403. The record not disclosing this, and that it might appear, a bill of exceptions was tendered to and authenticated by the district judge.

The bill of exceptions recites that the court in sustaining the demurrer based its decision upon those sections as the law upon which the indictment was founded "and held that there is no law of the United States which required the defendant, as claimant, in making his homestead proof, to testify with reference to the matters and things set forth in the indictment; the law of the United States requiring that said facts be proved by two credible witnesses other than the claimant, and not authorizing the claimant to testify in his own behalf with reference thereto." And so far as the assignment of errors is specific it states § 2291 as the applicable law and assails its construction.

This view of the applicable law of the indictment is now abandoned. Indeed, it is distinctly rejected. The Government in its brief here says: "The present indictment was *not* based on § 2291, for it seems probable that the 'two credible witnesses' there provided for mean two persons *other* than the claimant himself. Therefore, we must seek elsewhere for the authority in law for the claimant to make the oath as to his residence on, and cultivation of, the land he seeks to homestead." And, going elsewhere, the Government finds the law, as it contends, in certain regulations made by the Interior Department.

There is ground for a contention that if this court should be put to a choice between these views of the applicable law of the indictment we should have to select that urged and passed upon by the trial court, and a query might then occur—has this court jurisdiction under the Criminal Appeals Act? That act allows a direct appeal to this court "from a decision or judgment . . . sustaining a demurrer to any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded." Act of March 2, 1907, c. 2564, 34 Stat. 1246.

This statute seems to require an explicit declaration of the law upon which an indictment is based and a ruling on its validity or construction. To contend for one law as applicable in the trial court and another law in the appellate court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals.

But, accepting the case as properly here, we pass to the consideration of the present contention of the Government. Section 2291 is certainly a necessary if not a determinative element in that consideration. It provides as follows: " . . . If . . . the person making such entry . . . proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years . . . and makes affidavit that no part of such land has been alienated . . . and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she or they . . . shall be entitled to a patent." It will be observed that the facts required to be proved are stated, by what means proved, and the manner of proof and its quantum. The facts to be proved are (1) cultivation of and residence upon the land and (2) non-alienation and allegiance; the means of proof of the first being two credible witnesses; of the second, affidavit of the claimant. In other words, the section is not only explicit as to what is to be proved but in what manner proved; and what is required of the claimant himself, to-wit, an affidavit, is distinguished from what he must establish by others, to-wit, two credible witnesses. Such, then, are the conditions seemingly legislatively made the exact measure of the obligation of the homestead claimant. It certainly will not be asserted that they can be detracted from. It is asserted that they may be added to, and have been added to by virtue of certain sections of the Revised

Statutes. We insert the sections in the margin.[1] It will be seen that they confer administrative power only. This is indubitably so as to §§ 161, 441, 453 and 2478; and certainly under the guise of regulation legislation cannot be exercised. *United States* v. *United Verde Copper Co.*, 196 U. S. 207. Especial stress, however, is put upon § 2246. By that section the register or receiver is authorized and it is made his "duty to administer any oath required by law or the instructions of the General Land Office in connection with the entry or purchase of any tract of land." These sections, it is contended, as we have seen, were the law of the indictment.

Acting under the authority presumed to be given by § 2246 and the other sections, a regulation was promulgated which prescribed forms of taking preëmption and

[1] Sec. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * * * * * *

Second. The public lands . . .

Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Sec. 2246. The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

final homestead proof by questions and answers, and provided that "the claimant will be required to testify, as a witness, in his own behalf in the same manner." It was testimony exacted in pursuance of this regulation and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; § 2291 requires two only and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by § 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what § 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the Land Department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

In *United States* v. *United Verde Copper Co.*, *supra*, this court considered the power of the Secretary of the Interior under an act of Congress giving the right to cut timber from the public lands for certain purposes, which were enumerated "or domestic purposes," and making the right subject to such rules and regulations as the Secretary of the Interior might prescribe "for the protection of the timber and of the undergrowth growing on such lands, and *for other purposes*." (Italics ours.) The Secretary made a regulation which provided, among other things, that no

timber should be "permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining." The justification urged for the regulation was that the word "domestic" meant household. This court rejected the contention and decided that the regulation transcended the power of the Secretary. We said, "If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

In that case the power of the Secretary of the Interior was directly associated with the right conferred. Yet it was held that such power could not qualify or limit the right. In other words, a distinction between the legislative and administrative function was recognized and enforced. And, similarly, this distinction must be recognized and enforced in the case at bar. The distinction is fundamental. Where the charge is of crime, it must have clear legislative basis. In illustration we may cite *Williamson* v. *United States*, 207 U. S. 425; *United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Eaton*, 144 U. S. 677; *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *Biggs*, 211 U. S. 507; *Dwyer* v. *United States*, 170 Fed. Rep. 160.

Judgment affirmed.